

PROFILE OF CASES RELATING TO CIPAA 2012 REFERRED TO
COURT

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ABSTRACT

There have been several positive developments in the realm of construction dispute resolution in Malaysia in recent years. The more notable includes, among others, the setting up of Construction Courts and the transformation of the courts system and the implementation of a statutory adjudication regime through the CIPAA 2012. However, there have been instances whereby the adjudication decision was referred to the court in order to set it aside. Therefore, the objective of this research is to develop a profile of these cases. The approach adopted in this research is case law based and only cases between the years 2014 - 2018 reported by Malayan Law Journal will be focused in this study. A total number of 45 cases were studied and the analysis and subsequent findings revealed that there was a total of 25 cases whereby the adjudication decision was set aside due to the adjudicator has acted in excess of his jurisdiction, followed by 18 cases due to a denial of natural justice, 4 cases in which the adjudicator has not acted independently or impartially and 2 cases whereby the process of the proceedings was improperly procured through fraud or bribery, In summary, finding of this research will be able to increase the awareness of the construction players of the current scenario in relation to payment disputes as well as to assist them in addressing and overcoming the problems associated to payment disputes in Malaysian construction industry.

ABSTRAK

Terdapat beberapa perkembangan positif dalam bidang resolusi pertikaian pembinaan di Malaysia dalam beberapa tahun kebelakangan ini. Yang lebih ketara termasuk penubuhan Mahkamah Konvensyen dan transformasi sistem kemahkamahahan, pelaksanaan rejim pengadilan berkanun melalui CIPAA 2012. Tetapi, terdapat beberapa kes dirujuk kepada mahkamah untuk mengetepikan keputusan adjudikasi. Oleh itu, objektif bagi kajian ini adalah untuk mengembangkan profil bagi kes-kes ini. Pendekatan yang digunakan dalam kajian ini adalah berdasarkan kes undang-undang dan hanya kes antara tahun 2014 -2018 yang dilaporkan oleh Malayan Law Journal akan difokuskan dalam kajian ini. Sejumlah 45 kes dikaji dan analisis dan hasilnya menunjukkan bahawa sebanyak 25 kes di mana adjudikator telah bertindak melebihi bidang kuasanya. Diikuti dengan 18 kes yang disebabkan oleh penolakan keadilan alam semulajadi, 4 kes yang mana adjudicator adjudikator yang mana tidak bertindak secara bebas atau adil dan 2 kes yang mana proses persidangan dijalankan secara tidak wajar melalui penipuan atau rasuah. Ringkasnya, penemuan penyelidikan ini dapat meningkatkan kesedaran pemain pembinaan senario semasa berkaitan dengan pertikaian pembayaran serta membantu mereka menangani dan mengatasi masalah yang berkaitan dengan pertikaian pembayaran dalam industri pembinaan Malaysia.

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LIST OF ABBREVIATIONS

AIAC	-	Asian International Arbitration Centre
BLR	-	Building Law Report
CIPAA	-	Construction Industry Payment and Adjudication Act
CLC	-	Company Law Cases
EWHC	-	High Court of England and Wales
IBID	-	In the same place
J	-	Judge
HC	-	High Court
MLJ	-	Malayan Law Journal
MLJU	-	Malayan Law Journal Unreported
SGHC	-	Singapore High Court
SGCA	-	Singapore Court of Appeal
s	--	Section
SLR	-	Singapore Law Report
TCC	-	Technology and Construction Court

LIST OF CASES

NO. CASES

- 1 *ACFM Engineering & Construction v Esstar Vision Sdn Bhd and another case [2015] MLJU 1951*
- 2 *Anno Joo Integrated Steel Sdn Bhd v Lim Chuan Hock & Sons Sdn Bhd [2017] MLJU 1552*
- 3 *Barisan Performa Sdn Bhd v Hype Park City Sdn Bhd [2018] MLJU 10*
- 4 *Binastra Ablebuild Sdn Bhd v JPS Holdins Sdn Bhd and another case [2018] 8 MLJ 190*
- 5 *Bina Puri Construction Sdn Bhd v Syarikat Kapasi Sdn Bhd [2017] MLJU 785*
- 6 *Bina Puri Construction Sdn Bhd Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941*
- 7 *Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal [2018] 4 MLJ 640*
- 8 *Bumimetro Construction Sdn Bhd v Mayland Universal Sdn Bhd and another appeal [2017] MLJU 2245*
- 9 *Bertam Development Sdn Bhd b R&C Cergsd Teguh Sdn Bhd [2017] MLJU 1571*
- 10 *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878*

NO. CASES

- 11 *BM City Realty & Construction Sdn Bhd v Merger Insight (M)*

- Sdn Bhd and another case [2016] MLJU 1567*
- 12 *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2017] MLJU 2275*
- 13 *Conlay Construction Sdn Bhd v Wah Loon (M) Sdn Bhd [2017] MLJU 1065*
- 14 *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] MLJ 732*
- 15 *Euroland & Development Sdn Bhd v Tack Yap Construction (M) Sdn Bhd [2018] MLJU 861*
- 16 *Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd and another appeal [2018] MLJU 440*
- 17 *Foster Wheeler E&C (Malaysia) Sdn Bhd v Arkema Thochemicals Sdn Bhd and another case [2015] MLJU 1952*
- 18 *Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd [2016] MLJU 1054*
- 19 *Harmony Teamwork Construction v Vital Talent Sdn Bhd [2017] 10 MLJ 726*
- 20 *Inovatif Engineering (M) Sdn Bhd v Nomad Engineering Sdn Bhd [2016] MLJU 1351*
- 21 *Kerajaan Malaysia v Shimizu Corp & Ors [2018] MLJU 169*
- 22 *MIR Valve Sdn Bhd v TH Heavy Engineering Bhd and other case [2018] 7 MLJ 796*
- 23 *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2018] 4 MLJ 496*
- NO. CASES**
- 24 *Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd*

- and another appeal [2017] MLJU 169*
- 25 *Murni Environmental Engineering v Eminent Ventures Sdn Bhd & Anor and other suits [2016] MLJU 691*
- 26 *Mudajaya Corp Bhd v Leighton Contractors (M) Sdn Bhd [2015] 10 MLJ 745*
- 27 *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and other suites [2017] MLJU 905*
- 28 *Ranchan Heavy Engineering Sdn Bhd v Pelabuhan Tanjung Pelepas Sdn Bhd [2016] MLJU 1182*
- 29 *Rimbunan Raya Sdn Bhd v Wong Brothers Building Construction Sdn Bhd and another case [2016] MLJU 1189*
- 30 *Ranhil E&C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873*
- 31 *Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia [2017] MLJU 673*
- 32 *SQA Builders Sdn Bhd v Luxor YRM Sdn Bhd and another suit [2018] 10 MLJ 759*
- 33 *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd [2015] 11 MLJ 818*
- 34 *Sazean Engieering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd [2018] MLJU 839*
- 35 *TH Heavy Engineering Bhd v Innovative Synergy Solutions Sdn Bhd [2018] MLJU 31*
- NO. CASES**
- 36 *Teguh Wiramas Sdn Bhd v Thien Seng Chan Sdn Bhd and*

- another application [2017] MLJU 633*
- 37 *Terminal Perintis Sdn Bhd v Tan Ngree Hong Construction Sdn Bhd and another case [2017] MLJU 242*
- 38 *Tidalmarine Engineering Sdn Bhd v Conlay Construction Sdn Bhd and another appeal [2017] MLJU 738*
- 39 *UDA Holdings Bhd Holding Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499*
- 40 *View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22*
- 41 *VVO Construction Sdn Bhd v Bina MYK Sdn Bhd and another case [2017] MLJU 79*
- 42 *Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd [2017] MLJU 739*
- 43 *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd [2015] MLJU 1125*
- 44 *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications [2017] 2 MLJU 632*
- 45 *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case [2017] MLJU 738*
- 46 *Cape Durasteel Ltd v Rosser & Russell Building Services Ltd (1995) 45 Con LR 75*
- 47 *AT & T Corporation & Anor v Saudi Cable Company [2000] CLC 1309; [2000] BLR 293*
- NO. CASES**
- 48 *CIB Properties Limited v Birse Construction Limited [2004]*

- EWHC 2356(TCC)*
- 49 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyang Engineering & Construction Co. Ltd [2008] SGHC 159*
- 50 *Grouteam Pte Ltd v UES Holdings Pte Ltd [2016] 5 SLR 1011; [2016] SGCA 59*
- 51 *WY Steel Construction Pte Ltd v Osko Pte Ltd [2013] 3 SLR 380*
- 52 *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd [2015] MLJU 695*
- 53 *Sinnaiyah & Son Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MJL 1*
- 54 *McAlpine PPS Pipeline Systems Joint venture v Transco Plc [2004] BLR 352*
- 55 *Thermal Energy Construction Ltd v AE & E Lentjes UK [2009] EWHC 408 (TCC)*
- 56 *C&R Jacques Partnership v Ensign Contractors Ltd [2009] EWHC 3383 (TCC)*
- 57 *Enterprise Managed Services v Tony McFadden Utilities Ltd [2010] BLR 89*
- 58 *Vertase FLI Ltd v Squibb Group Ltd [2012] EWHC 2218 (TCC)*
- 59 *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd [2004] EWHC 888 (TCC)*
- 60 *Goldsworthy & Ors (t/a Goldsworthy Builders) v Harrison & Annor [2016] EWHC 1589 (TCC)*
- NO. CASES**
- 61 *Westminster Building Company Ltd v Andrew Beckingham*

[2004] EWHC 138 (TCC)

62 *Ritma Hebat Sdn Bhd v Kayangan Kemas Sdn Bhd and another
suite [2017] MLJU 2034*

CHAPTER 1

INTRODUCTION

1.1 Problem Background

There have been several positive developments in the realm of construction dispute resolution in Malaysia in recent years. The more notable includes, among others, the setting up of Construction Courts (Sundra Rajoo, Philip Koh, 2016) and the transformation of the courts system, the implementation of a statutory adjudication regime through the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012), and the increased receptiveness by construction players to the idea of using various other forms of ADR for the resolution of construction disputes.

With 711 adjudication matters in the calendar year 2017, up from 463 in the year 2016, another record in the number of adjudications matters registered was set. The vast majority, 704 of

these matters, was fully registered by the end of the year 2017, with only seven matters still pending registration. The trend of growth continues in the 2018 period relevant for the 2018 CIPAA report: if during the remainder of the year 2018 as many matters were referred to CIPAA Adjudication, by the end of the 2018, the cases reached would be 882.¹

Judge Lloyd QC in *Cape Durasteel Ltd v Rosser & Russell Building Services Ltd* (1995) 45 Con LR 75 held²:

It is plain that ‘adjudication’ taken by itself means a process by which a dispute is resolved in a judicial manner. It is equally clear that “adjudication” has as yet no settled meaning in the construction industry (which is not surprising since it is a creature of contract and contractual procedures utilizing an “adjudicator” vary as so forms of contract).

In case of *View Esteem*³, Mary Lim J in assessing the Adjudicator’s decision said;

In this Adjudication Decision, I find the Adjudicator has methodically, systematically and carefully identified the issues raised by both parties, heard and evaluated the argument, the

¹ Sharing solutions. The report is generated by the AIAC in connection with the CIPAA Conference 2018 (07th May 2018)

² Sundra Rajoo, Harbans S. (2012) *Construction Law in Malaysia*. Sweet & Maxwell Asia

³ *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695

evidence, the law; weighing each of them before he made his findings and drew his conclusions in measured tones. His considerations are also proper and mature. And, as can be seen, he made so many findings of fact. He may have appeared to treat hearsay inconsistently, but I do not find that fatal since the Evidence Act 1950 [Act 56] does not apply to adjudication proceedings under the Act as stated in subsection 12(9) of CIPAA 2012. In any case each issue took into account views and evidence led by both parties and the submissions made by both legal counsels. The issues identified and considered are highly appropriate to the dispute and the determination by Adjudicator is well within his mandate and powers given by the parties under Section 5 and 6, read with Section 12.

This means that the quality of an adjudicator is important as it will directly affect the objective of CIPAA as a speed resolution for payment dispute and the judication decision will be challenged by losing parties to court to set aside the decision. It also expressed the expectation of the Court on adjudicator.

1.2 Problem Statement

With the recent cases that brought to court and how adjudication has developed in Malaysia over the last four years since its coming into force. Adjudication may not have achieved its aims of providing a swift resolution as the ultimate decision will be determined by the Court as getting more and more aggrieved parties apply to the court to set aside adjudication decision. Courts have granted leeway for adjudicators to decide rightly or wrongly because of the rough nature of the process and provisional nature of the decision so long as statutory processes are followed, and natural justice observed.

The Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) was gazette on 22nd June 2012 and enforced on 15th April 2014 to:

- a) Facilitate regular and timely payment;
- b) Provide a mechanism for speedy dispute resolution through adjudication;
- c) Provide remedies for the recovery of payment in the construction industry;
- d) Provide for connected and incidental matters.

In recent years, the number of adjudication cases has grown substantially as shown in the table 1.1:

Table 1.1 Registered matters based upon calendar month

(Adapted from Sharing Solution, AIAC, 2018, pp.13)

Month	2015 (15/04/15-31/12/15)	2016 (As of 15/04/16)	2016 (16/04/16 31/12/16)	2017 (As of 15/04/17)	2017 (16/04/17-31/12/17)	2018 (As of 15/04/18)	Total
Jan		13		28		97	150
Feb		19		48		46	124
Mar		27		70		77	202
Apr	1	22	11	35	27	24	124
May	12		34		60		106
Jun	7		29		53		90
Jul	15		40		50		107
Aug	9		42		77		131
Sep	10		33		65		111
Oct	25		48		64		144
Nov	31		75		63		173
Dec	16		54		62		141
Sub- Total	126	81	366	181	521	244	1603
Total	207		547		765		

However, Ir Harbans Singh K S, 2018, *pointed out the harsh realities of the adjudication process and addressed the failing of CIPAA. The mantra is “pay first. Argue later”, and the regime ideally intended to expedite cash flow by providing remedies for the recovery of payment, to alter existing payment culture and to improve contract administration. But, a lack of appreciation for the workings of adjudication has rendered the process into a form of fast-track arbitration. Adjudication is a byword for rough justice and as such, there is no place for the fastidious application of procedural niceties to what is essentially a summary procedure. This has triggered a growing disillusionment with adjudication.*⁴

Even though the adjudication decision is binding unless it is set aside by the High Court on any of the grounds in section 15 of the CIPAA, the subject matter of the decision is settled by a written agreement between the parties or the dispute is finally decided by arbitration or the court,⁵ it might be challenged by the court in some circumstances. The aggrieved party may apply to the High Court to set aside the adjudication decision.

⁴ Ir Harban Singh K S. (2018) Internal Malaysia Law Conference 2018. 14th-17th August 2018.

⁵ Section 13 of CIPAA 2012

A party may also apply to the High Court for a stay of an adjudication decision in the following circumstances:⁶

- a) An application to set aside the adjudication decision under section 15 has been made or
- b) The subject matter of the adjudication decision is pending final determination by arbitration or the court.

The CIPAA 2012 was enacted with a defined set of objectives to be achieved. This was the vision of the draft committee for the Act, the government as well as the major stakeholders of the local construction industry. The question that arises now is whether it has achieved the objectives of CIPAA and, if in the process it is moving in the right direction.

The research questions are:

- a) When can a Respondent raise a jurisdictional challenge in Court?
- b) Can an adjudicator proceed when there is a pending challenge on jurisdiction before the Court?
- c) What should an adjudicator do if a jurisdictional challenge is raised in the adjudication which is upheld by the adjudicator?
- d) Where claims are distinguishable or severable, can an adjudication proceeding proceed with claims that are not lacking in jurisdiction or can an adjudication decision be set aside partially?

⁶ Section 16 of CIPAA 2012

- e) Does an adjudicator have the jurisdiction, and must the adjudicator consider and deal with all defences raised in an Adjudication Response even if it were not raised in a Payment Response? Does this apply to set-offs? Does this apply to counterclaims?
- f) Does the interpretation of Section 6 (4) effectively nullify or make redundant Section 6(1), (2) and (3)?
- g) Does the interpretation of Section 27(1) limit the defences that can be raised only to those that relate directly to the cause of action and no other set-offs or counterclaim?
- h) Is it a breach of natural justice by the Adjudicator for construing and limiting jurisdiction based on the law as it stood?
- i) Can parties raise obvious or clear errors in finding on merits in order to procure a stay of an adjudication decision?

1.3 Objectives

The objective of this research is

1. To determine the available grounds that contribute the cases referred to court of law to set aside the adjudication decision.
2. To develop a profile of cases and to determine the clarification of the ground to set aside the adjudication.

1.4 Scope of the Research

The scope of this research as following:

- i) Only CIPAA cases will be discussed in the study
- ii) Related Malaysian court cases focus on the issue of CIPAA 2012 reported in Malaysia Law Journal (MLJ) from the year 2014 to 2018.

1.5 Significant of the Research

The contribution of the research is to provide a clearer understanding of the CIPAA 2012 and how it is intended to work for the benefit of the construction industry in Malaysia. It advances knowledge of construction adjudication in Malaysia by reflecting the most current issues in the statutory dispute resolution created by CIPAA 2012 and a good number of decisions have been generated from the Malaysia Courts which will help to develop the Malaysian jurisprudence in the field of construction adjudication and moving in the right direction. Its emphasis on the best practices in construction industry and legal, consultants, and contractors can advise the Clients better.

This research also provides a useful framework, the adjudicators and construction players would be able to gain insight into the various types of construction cases brought to court, the decisions made by judges. Legal and construction players would be able to improve their practice and will be more responsible in carrying out their duties without making similar mistakes which were made in previous cases.

This research consists of analysis of recent court cases that would be useful for adjudicators to aware the quality of the adjudication decisions which directly impact the effectiveness of the process itself. This involves two main facets, namely the quality of the adjudicators as well as the quality of the submissions made by the parties.

1.6 Research Methodology

Literature review is conducted in relation to profiling and the relevant attributes in relation to construction adjudication in Malaysia. It also assists in setting up the direction of this research as in determination of the research objective to provide a better understanding on the subject matter and methodology to be adopted as well as the sources of data to be included i.e. law

journals, books in relation to construction adjudication in Malaysia.

This research is using doctrinal methodology. Doctrinal research methodology does not make use of qualitative and quantitative legal research tools because it gives a broader perspective to the dimension of law while linking to the society which after all law are regulates.⁷ The doctrinal research is research in to legal concept and principal of all types of case, statutes and rules. It is concerned with analysis of the legal doctrine and how it has been developed and applied. The fact of the cases and court's judgement would assist in the identification of the issues arise from each CIPAA cases that brought to court.

⁷ Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development by Vijay M Gawas, Volume 3; Issue 5, September 2017; Page Bo.128-130

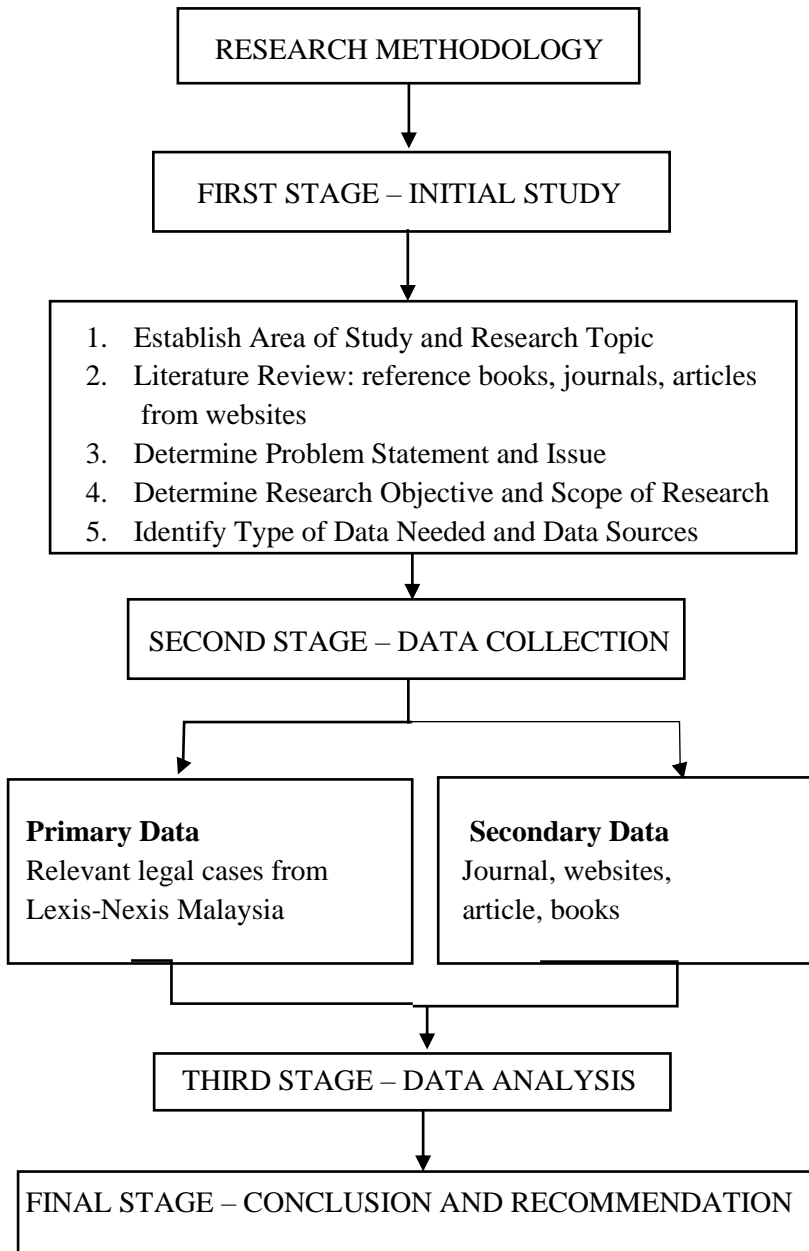


Figure 1.1: Research Methodology

1.7 Organization of the Research

This research is organized into five chapters. An introduction to the essence and problems can be found in chapter one. The context of the research is also briefly discussed. The research objectives are being addressed together with the scope that highlights the limitations of the research.

Chapter two is a review on related literatures on Construction Adjudication in Malaysia. Reviews are done in relation to the CIPAA 2012 especially for grounds to refer the cases of CIPAA to court in order to set aside the adjudication decision.

Chapter three discusses the research methodology that consists of data collection and analysis to ensure the objectives of this research is achievable.

Chapter four is the analysis and discussion of the research highlighting the grounds of cases, the case analysis and legal issues. Chapter five is the conclusion after achieving the objective of the research and recommendation for future research.

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